SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1121

CITY OF NEW YORK, *Appellant*,

v.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION, *Appellees*.

Appeal From the United States District Court for the Central District of California

BRIEF FOR THE CITIES OF BALTIMORE, MD., PHILADELPHIA, PITTSBURGH, SCRANTON, LANCASTER, and ERIE, PA. AS AMICI CURIAE

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Argument	3
Conclusion	14

CITATIONS

CASES:

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 385 U. S. 129	12
Emich Motors Corp. v. *General Motors Corp.*, 340 U. S. 558	5, 6
International Shoe Machine Corp. v. *United Shoe Machine Corp.*, 315 F. 2d 449 (1st Cir.)	6
U. S. v. *Davis*, 1953 Trade Cases, ¶ 67,403 (S.D. N.Y.)	10
U. S. v. *General Electric*, 82 F. Supp. 753 (D.C. N.J.)	10
U. S. v. *Mich. Tool Co.*, 1956 Trade Cases, ¶ 69,290 (D.C. Mich.)	10
U. S. v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D.C. Mass.)	10
U. S. v. *New Departure Mfg. Co.*, 204 F. 107 (D.C. N.Y.)	10
U. S. v. *Standard Oil Co. of Calif.*, 1959 Trade Cases, ¶ 69,399 (S.D. Calif.)	13

STATUTES:

15 U.S.C. § 4	2
15 U.S.C. § 16(a)	3
15 U.S.C. § 29	2
Rule 24, F.R.C.P.	3
5 USCA 555(b)	12
45 CFR, Part 85	5

MISCELLANEOUS: Page

FR Docket 70-1607 5

Flynn, Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals, 53 Iowa L. Rev. 983, 985, Footnote 3, 990, 1012 (April 1968) 6, 8, 11

Hearings, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, Part 1 (Oil Pipe Lines) Oct. 1957 (2 Volumes), Part 2 (AT&T) May 1958 (3 Volumes) 11

Kaplan, "The Asphalt Clause—A New Weapon in Antitrust Enforcement," 3 Boston College Industrial and Commercial L. Rev., 355 (Spring 1962) .. 4

"Message from the President on Environmental Quality," Feb. 10, 1970, Vol. 116, No. 18, Cong. Record, pp. S. 1604-1614 3

Report, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, 86th Cong., 1st Sess., Jan. 30, 1959 11

Secretary of Health, Education, and Welfare, Second Report to The Congress of the United States Pursuant to Public Law 90-148, The Air Quality Act of 1967, S. Doc. No. 91-11, 91st Cong., 1st Sess., (1969), p. 38 3

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This Brief is filed pursuant to the provisions of Supreme Court Rule 42(4). Amici Curiae all being political subdivisions. Each is a major metropolitan urban area which has an air pollution problem caused by automobile exhaust emissions. If the defendants were guilty of the acts charged in the government's complaint, entry of the consent judgment below adversely affected the interests of each Amicus Curiae and its residents.

OPINIONS BELOW

The district court's oral opinion of October 28, 1969, and its memorandum opinion subsequently filed on November 7, 1969 have not been officially reported. These opinions are set forth in Appendix A, pp. 1a-15a of printed Appendix filed by Appellant City of New York.[1]

JURISDICTION

On January 10, 1969, the United States instituted this civil antitrust action against the defendants pursuant to 15 U.S.C. § 4. The City of New York, by appropriate applications, sought leave to intervene both before and after the district court's approval on October 28, 1969 of a consent judgment submitted by the parties. By orders entered on October 28, 1969 and December 16, 1969, the district court denied the City's intervention applications. On December 22, 1969, the City filed a notice of appeal in the United States District Court for the Central District of California. This Court has appellate jurisdiction by virtue of 15 U.S.C. § 29.

QUESTION PRESENTED

This Brief will discuss the following question, which it is believed is comprehended by the questions that Appellants present:

Where a consent judgment has been negotiated between the United States and the major automobile manufacturers in a civil antitrust suit alleging a Sherman Act conspiracy with respect to motor vehicle air pollution control equipment, affecting all states, cities, political subdivisions and their citizens in the United States:

(a) Did the District Court abuse its discretion by approving and entering the judgment without requir-

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[1] "App." references are to printed Appendix filed by Appellant City of New York.

ing inclusion of a provision giving it prima facie effect in private actions brought by governmental bodies and others?

(b) Did the District Court abuse its discretion by not allowing intervention by representatives of the governmental bodies affected, for the purpose of furnishing a record to permit the District Court to make an independent judicial determination that entry of the decree without a prima facie effect is not in the public interest and that of the governmental bodies seeking to vindicate that interest?

STATUTES INVOLVED

Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), and Rule 24 of the Federal Rules of Civil Procedure are set forth in Appendix B, pp. 15a-16a, filed by Appellant City of New York.

STATEMENT

We hereby adopt the statement as set forth in the jurisdictional statement of Appellant City of New York.

ARGUMENT

Eliminating pollution is now the policy of our national government.[2] Air pollution, in particular, affects directly the ability of man to survive on this planet. The major cause of air pollution is the automobile.[3] This case alleges a conspiracy among major

[2] "Message from the President on Environmental Quality, Feb. 10, 1970, Vol. 146, No. 18, Cong. Record, pp. S. 1604-1614.

[3] Motor Vehicles presently account for 90% of all carbon monoxide, 60% of the hydrocarbons, 50% of the oxides and virtually all of the lead emitted into the atmosphere. Secretary of Health, Education, and Welfare, Second Report to The Congress of the United States Pursuant to Public Law 90-148, The Air Quality Act of 1967, S. Doc. No. 91-11, 91st Cong., 1st Sess. (1969), p. 38.

automobile manufacturers to suppress the use of technology which could arrest such pollution. If true, there is not a public body or citizen who has not been affected by the violation alleged.

The government through the antitrust division had an opportunity to further national policy by insisting on the trial of the case so that the evidence obtained by the government in the course of its investigation would have been fully aired, alerting the states and cities and their citizens to everything the defendants are alleged to have done. In the alternative, the antitrust division could have insisted on inclusion of a clause [4] in the consent decree, giving it prima facie effect in subsequent private antitrust actions.

Instead, a settlement was negotiated between the government and defendants which was accepted by the lower court. No testimony was taken and no prima facie effect flows from the consent decree.

Rather than giving maximum aid to those who have been injured in obtaining redress for their injuries, the decree primarily requires the defendants to cease doing what in the current climate of public awareness and concern over the threat of air pollution they would be obliged to cease in any event.

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[4] An "Asphalt Clause." "The term 'asphalt clause' refers to a specific provision in a consent decree terminating a civil antitrust case brought by the Federal government. The clause provides that the decree shall have a specified prima facie effect in favor of the plaintiffs in certain subsequent private treble damage actions for the same violation. Its existence is the result of administrative and judicial, rather than Congressional action." Kaplan, "The Asphalt Clause—A New Weapon in Antitrust Enforcement," 3 Boston College Industrial and Commercial L. Rev., p. 355 (Spring 1962). Also contains excellent history of the "asphalt clause."

In addition, the development of new technologies and existing and proposed new Federal standards of pollution control make moot much of the relief included in the decree.[5]

The role of private litigants as an adjunct of the government in enforcing the antitrust laws has been recognized in many decisions of this Court.[6] Surely, in a case of this national importance, the government should deal with such litigants as allies, giving them the benefit of the widest possible effect of the government proceedings.

Indeed, the legislative history of Section 5 makes plain the concern of Congress that the private litigant should get the fullest possible benefit out of a government case. It is clear that the primary purpose of this section was to aid private litigants. Its enactment was prompted primarily by a message of President Wilson in 1914, which made specific reference to the inadequacy of existing legislation in assisting the private suitor. Sympathy for his plight ran so strong that the original House Bill provided that government judgments should be conclusive evidence against the defendant. A Senate amendment changed this to "prima facie" only because of doubts regarding its constitutionality. The proviso of Section 5 which exempts consent judgments from the prima facie rule emerged from a House-Senate conference and reflected concern that the bill would seriously affect the government's flexibility when negotiating and bargaining for consent decrees. It is clear, however, that the proviso was not

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[5] 45 CFR Part 85, F. R. Doc. 70-1607; filed Feb. 9, 1970.

[6] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 and cases cited therein.

intended to give the defendant a "right" to capitulate in every case. It was the right of the private litigant with which Congress was primarily concerned—not the rights of the defendant.[7]

Therefore, we submit that the lower court erred in accepting the consent judgment in the circumstances of this case, and that it erred further by not allowing those vitally concerned to make a record, on the basis of which it could be properly determined, what judicial standards should govern the Court's decision and how they should be applied.

When does the "public interest" require that the Court refuse to accept what for all practical purposes is a negotiated settlement between the government and the defendants in an antitrust suit?

It is submitted that this is an appropriate case, indeed a compelling case, for this Court to set forth at least minimal standards to guide the district courts in this unsettled area of the law. Indeed, in view of the fact that apparently almost 80 per cent of government antitrust cases are terminated by consent decree, it would seem that the proper administration of antitrust policy require that this vital area of the law be illuminated by this Court.[8]

The acceptance of a consent judgment prior to testimony and without inclusion of an "asphalt clause"

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[7] This analysis of legislative interest is supported by:

Emich Motors Corp. v. *General Motors Corp., supra; International Shoe Machine Corp.* v. *United Shoe Machine Corp.*, 315 F. 2d 449, 453 (1st Cir.)

[8] Flynn, Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals, 53 Iowa L. Rev. 983, 985, Footnote 3 (April 1968).

gives no aid to the private litigant. The public bodies injured by the violation must start from scratch in proving their case. Unless an immediate and assured injunction against the challenged conduct is of overriding importance, acceptance of such a decree should be subjected to the most thorough and serious scrutiny, on a proper record, where those vitally affected can be heard. Where a showing could be made—as we suggest in this brief—that the injunction is not of overriding importance, other considerations may well outweigh the need for such assured and prompt relief. The difficulty here is that those who could have explored the factors to be considered in arriving at a full determination of those issues were not permitted to intervene.

In reconciling the various interests involved, this Court might consider the possibility that all of the advantages. That Congress foresaw in the passage of Section 5 could be . . . sustained under the circumstances of this case by the requirement that the consent judgment be approved only if an "asphalt clause" be inserted in the judgment.

It has been suggested by one commentator that:

> ". . . . Section 5 was intended to benefit third parties injured by an antitrust violation and provide a stimulus to defendants to settle for the benefit of efficient government enforcement. Rather than being contrary to the Congressional purpose for enacting Section 5 of the Clayton Act, the asphalt clause seems to be a unique device for carrying out the two major purposes behind Section 5—to assist injured third parties and to obtain government enforcement of the consent decrees. Indiscriminate use of the asphalt clause might well hamper the purpose of stimulating capitulation by defendants, but the collective use of asphalt clauses in cases where the government has a strong case

> and the injured third party to be benefited are public agencies or persons unable to litigate a treble damage action seems a worthwhile policy the government should follow. In this way a further deterrent will be added to the antitrust arsenal, the public purse will be spared the expense of duplicating investigations and litigation, third parties injured by antitrust violation will be spared the cost of litigating a complex damage claim, and the courts will be spared the burden of several treble damage suits spawned by successful government unmasking of an antitrust violation."[9]

The District Judge himself recognized that there are occasions when a negotiated consent judgment should not be accepted by the Court. In his opinion he said: "It is the Court's duty to protect the rights of persons who are not parties to the action, and, of course, the decree should not be approved if it is contrary to the public interest." (App. 3a)

But the crucial question is not whether a decree is contrary to the public interest, but rather whether it actually serves the public interest in the best possible way. It is submitted that where, as here, the following criteria are present, the public interest is not served by the acceptance of the consent judgment without the inclusion of, at the very least, an "asphalt clause": (1) the potential damage to the general public resulting from the violations is far-reaching in its magnitude; (2) public agencies, including states, cities and other political subdivisions, have borne the primary brunt of the antitrust violations; (3) such entities have either filed damage actions or indicated they intend to do so, and a multiplicity of lawsuits by such entities is indicated; and (4) the injunctive relief

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[9] Flynn, *supra*, pg. 1012.

obtained by the government, as a practical matter, is of limited utility.

The lower court justified its acceptance of the consent decree as follows:

> "It is strongly urged by many that the decree should be rejected as not being in the public interest, but no good reason appears to this Court for finding this to be so. In the first place, it provides the government with substantially all the relief that it would have obtained if it had tried the case and won. It avoids the tremendous expense of time and money which would be required of the antitrust division in the event of a trial. The decree brings immediate results, whereas if this case were to be tried any benefit of a final decree would be delayed many years. It brings an assured result. Those objecting have all assumed that the government would win the action if it were brought to trial. But the government's case is based upon a novel and unadjudicated theory. If the government should try this case and lose, the benefits of the decree would be lost. For these reasons, it appears to the Court that the proposed decree is in the public interest." (App. 14a, 15a)

Whether or not "it provides the government with substantially all the relief it would have obtained if it had tried the case and won" misses the basic point. That is whether the Court's duty to protect the rights of persons who are not parties to the action, and the public interest is furthered by allowing the entry of a consent judgment without an "asphalt clause". In today's climate of aroused public and governmental consciousness and conscience about pollution, the "assured result" will be brought about by standards pursuant to legislation and also, because the defendants can no longer afford to engage in their past misconduct.

This is the kind of case where the most effective way to discourage any recidivism on their part is to make them responsible for the injuries already caused. To that end a judgment entered after trial, or a consent decree including an "asphalt clause" would be of greater value, than a decree which cannot be used except to compel the defendants to do or refrain from doing certain acts in the future.

The rationale that a "tremendous expense of time and money would be required of the Justice Department in the event of trial" misses another essential point. The lower court appears to be equating the public interest in terms of what is better for the antitrust division. It may well be that the public interest requires that the antitrust division accept this burden, rather than shifting this tremendous expense of time and money to the general public, the states, cities and other political subdivisions affected by the violation. How can the time and money of the Justice Department be spent to better advantage?

That "the government's case is based upon a novel and unadjudicated theory" is not apparent from the pleadings. Certainly, there is nothing either "novel or unadjudicated" about the hard core kind of antitrust conspiracy alleged in the government's complaint.[10]

The trouble with the District Court's conclusions is that they are based on assumptions not necessarily true.

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[10] See *U. S. v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D.C. Mass.); *U. S. v. Davis*, 1953 Trade Cases ¶67,403 (S.D. N.Y.); *U. S. v. New Departure Mfg. Co.*, 204 F. 107 (D.C. N.Y.); *U. S. v. Mich. Tool Co.*, 1956 Trade Cases 69,290 (D.C. Mich.); *U. S. v. General Electric*, 82 F. Supp. 753 (D.C. N.J.).

The Court should have allowed intervention for the purpose of establishing a record upon which sound conclusions could be based.

It is, of course, not necessary to belabor the point that consent judgments do not always serve the public interest. This has been adequately demonstrated in hearings before the antitrust subcommittee of the House Committee on the Judiciary,[11] and by the report of that same subcommittee.[12]

Professor Flynn has described the procedure as follows:

> "At best, judicial implementation of consent decrees in most cases can only be analogized to the performance of a symbolic religious rite by a high priest, or, at worst, as the performance of an important public function with the machine-like logic of a chiclet dispenser. . . . Thus the court is presented with a 'negotiated contract' with little or no understanding of its background, content, or consequences, and mechanically performs the rite of stamping the contract with the approval of the judiciary."[13]

Certainly, in a case which directly affects the heart of the nation and all of its citizens, this mechanical

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[11] Hearings, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, Part 1 (Oil Pipe Lines) Oct. 1957 (2 Volumes), Part 2 (AT&T) May 1958 (3 Volumes).

[12] Report, Antitrust Subcommittee of the House Committee on the Judiciary, Consent Decree Program of the Dept. of Justice, 86th Cong., 1st Sess., Jan. 30, 1959.

[13] Flynn, *supra*, pg. 990.

process, or even the appearance of such a process should be avoided, and all of the standard assumptions and justifications for taking the easiest way out, should be subjected to the normal judicial method for arriving at an informed decision—permitting interested parties to be heard.[14]

This Court, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*,[15] recognized the valuable role which intervention can play in protecting the public interest. There is other precedent for allowing intervention, at least for the purpose of making a record so that the District Court can be fully informed before accepting the consent judgment in an appropriate case. Such a procedure was followed before acceptance of a consent

[14] While it is true, as the district court also pointed out, that the decision to settle an antitrust case is an administrative decision, it is also true that the product of the negotiations may have far-reaching effect on others besides the defendants. In this sense, the procedure is something more than the making of an administrative decision. It is a process of negotiation. In other types of such administrative proceedings, however, the Civil Procedure Act would allow interested parties to appear and present their views. However, the type of proceeding in which consent decrees are negotiated does not fall within the purview of the act. The consent decree process, therefore, is in the nature of an administrative proceeding without any of the trappings of traditional procedures in administrative actions. As a result, the only opportunity for an affected third party to be adequately protected is by intervention at the time the negotiated consent decree is presented to the Court. See 5 USCA 555(b), which provides in part:

> ". . . So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. . . ."

[15] 385 U.S. 129.

decree in *United States* v. *Standard Oil Co. of Calif.*[16] There the court held a "hypothetical trial" on one of the issues involved in the consent decree.

The District Court in this case bases its decision not to allow permissive intervention on the ground that "to allow permissive intervention in this case would certainly delay and prejudice adjudication of the original parties." (App. 12a) But if the Court has a duty, before accepting a consent judgment to determine "whether or not the rights of persons not parties to the action are jeopardized and whether the consent decree is against public interest," (App. 14a) then it is difficult to understand how intervention for the limited purpose of making a record to answer such questions can be prejudicial to any party. Certainly, if the role of the antitrust division is to protect the public interest, that role can only be reinforced by an adequate presentation of precisely what the public interest is or ought to be in a particular case.

The reasons given by the Court in its opinion, both for allowing the entry of the consent decree and for disallowing the limited intervention sought, are based on conclusions not substantiated by what we believe are the actual facts in this case. It is difficult for the most learned of judges to exercise proper discretion, or for the Supreme Court to adequately review District Court actions, where no record has been made. Allowing limited intervention by public bodies in this case would cure this deficiency in these proceedings.

Further, it would be particularly helpful if this Court would establish standards, as suggested, against

[16] United States v. Standard Oil Co. of Calif., 1959 Trade Cases, ¶ 69,399 (S.D. Calif.).

which the District Court could measure the facts developed at such a hearing.

CONCLUSION

A case of this magnitude, affecting as it does the major source of the pollution of our air, requires better protection for the public interest and public body litigants than is afforded by this consent decree. Judicial criteria are needed to guide the District Court. At a minimum, limited intervention is necessary so that a record can be developed against which the District Court can determine appropriately whether the public interest has been sufficiently served by the entry of the consent decree under the circumstances of this case and whether the public body litigants have been adequately protected.

Respectfully submitted,

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